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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 816

ERNEST NEWTON KALB, PETITIONER,

VS.

HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

PETITION AND BRIEF

For Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

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ERNEST NEWTON KALB, PETITIONER,

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HENRY FEUERSTEIN AND HELEN FEUERSTEIN, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

(The brief in support of this petition begins at page nine.)

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

A Summary Statement of the Matter Involved.

This petition arises out of Section 75 of the Bankruptcy Act; 11 U. S. C. 203, relating to farmer debtors. The decision below is reported as *Kalb* v. *Feuerstein*, 116

F. 2d 775, and it appears at page 39 of the record. The opinion of the bankruptcy court which was sustained by the court below is found at page 22 of the record. The final orders of the bankruptcy court which were the subjects of the appeal below are at pages 26 to 28 of the record.

The petitioner is a farmer debtor who mortgaged his farm to the respondents. The petitioner, the respondents, and the farm here involved were also involved in Cases 120 and 121, October Term, 1939, decided by this court on January 2, 1940, and reported as *Kalb* v. *Feuerstein*, 308 U. S. 433, on appeal from the Supreme Court of Wisconsin. This court there held that because of the pendency of the petitioner's farmer debtor proceeding in the bankruptcy court the following acts of the County Court of the State of Wisconsin in a foreclosure action were unlawful and void: (1) Confirmation of sale to the respondents as mortgagees; (2) the execution of a sheriff's deed to them; (3) the writ of assistance issued at their request; (4) the ejectment of the petitioner and his family from the farm; and (5) placing the respondents in possession.

The status of the foreclosure action remains precisely as it was when this court declared the acts of the state court to be unlawful and void. The mortgage holders (the respondents here) still continue their unlawful possession. The farmer debtor (the petitioner here) has not been able to regain possession of his farm because the bankruptcy court below has restrained him from entering upon it (R. 28, folio 36).

When the state court ejected the petitioner from his farm, his farmer debtor proceeding was pending before the conciliation commissioner of the bankruptcy court. After the mandate issued from this court to the Supreme Court of Wisconsin an examination of the docket of the bankruptcy court disclosed that the farmer debtor proceeding had been dismissed without any notice or hearing whatever. The docket showed that the conciliation commissioner without notice recommended that the bankruptcy court dismiss the case and that court dismissed

it on the same day, just five days after the state court had ejected the petitioner and put the respondents in possession (R. 10, folio 12, R. 11, folio 13, also R. 14, last whole paragraph of folio 17). Thereupon the petitioner filed in the bankruptcy court his petition and amended petition for rehearing of the order of dismissal and for reinstatement of his farmer debtor proceeding (R. 12-13, R. 13-17).

The bankruptcy court denied reinstatement and also restrained the farmer debtor from entering on his farm (R. 26-27, folio 34, R. 28, folio 36). Opinion of the bankruptcy court: (R. 22-26). The farmer debtor appealed from both orders of the bankruptcy court (R. 28, folio 39, R. 30, folio 40). The Appellate Court affirmed the order of the bankruptcy court denying reinstatement, but took no action upon the order restraining the farmer debtor from entering upon his farm (R. 45). *Kalb* v. *Feuerstein*, 116 F. 2d 775: (R. 39).

The petitioner contends that the dismissal of his farmer debtor proceeding without notice and without hearing on the same day that the conciliation commissioner without notice recommended such dismissal, while the litigation was pending in the state courts and in this court to determine the legality of his ejectment should not deprive him of the benefits of Section 75.

He also contends that he has the right to the immediate possession of his farm and he bases his contention upon the decision of this court holding that his ejectment by the state court was unlawful and void.

II.

Statement of the Basis of the Jurisdiction of This Court.

The jurisdiction of this court stems from the general power conferred by Judicial Code, Section 262; 28 U. S. C. 377. It is conferred by Judicial Code, Section 240 (a); 28 U. S. C. 347 (a). The petitioner has complied with

Section 8 (a) of the Act of February 13, 1925, Ch. 229; 28 U. S. C. 350.

The decision of the circuit court of appeals was announced on November 8, 1940, and is reported as *Kalb* v. *Feuerstein,* 116 F. 2d 775 (R. 39). A petition for rehearing was denied January 8, 1941 (R. 65). The mandate of the court below was stayed to March 10, 1941 (R. 69).

III.

The Questions Submitted.

Two simple questions are submitted:

1. Could the bankruptcy court lawfully enjoin the petitioner from entering upon his farm in the face of this court's final determination that he and he alone had the right of possession and that the possession of the respondents was unlawful and void.

2. Could the bankruptcy court lawfully dismiss the farmer debtor proceeding without notice and without hearing.

IV.

Reasons Relied Upon for Allowance of the Writ of Certiorari.

First. As to the Restraining Order.

The order restraining the petitioner from going upon his farm is not merely without authority. It is in direct conflict with the express decision of this court in *Kalb* v. *Feuerstein,* 308 U. S. 433, which holds that the petitioner, and he alone, has the lawful right of possession. This court in that decision further expressly held that the possession of the respondents is unlawful and void. Indeed the judge of the bankruptcy court who issued the restraining order stated there was no power or authority to issue it. The following is quoted from the "Opinion on Motion to Reinstate" which appears at rec-

ord pages 22 to 26, folios 31 to 34. The quotation appears at record page 25, being the first paragraph:

> "The situation resolves itself to this: If the petion of Kalb for reinstatement of his proceedings under Section 75 is granted, then clearly the court has the necessary power and jurisdiction to enter an order respecting the property in question; **but if the court declines to reopen the proceedings and declines to vacate the order of this court dated March 17, 1936, then there is nothing before this court, and there would be no power or authority to enter a restraining order.**" The emphasis is supplied.

The order of the bankruptcy court that it had no jurisdiction over either the farmer debtor or his farm in denying reinstatement was directly contradictory to its assumption of jurisdiction over both in issuing the restraining order.

Even if the bankruptcy court had recognized its jurisdiction by reinstating the case it could not lawfully have restrained the farmer debtor from entering upon his farm. This court has repeatedly held that the purpose of the law is to maintain the farm as a going concern with the farmer debtor remaining in possession so that he may have opportunity to rehabilitate himself.

Second, As to the Denial of Reinstatement of the Farmer Debtor Proceeding.

The petitioner has been deprived of due process of law while he was litigating his right to the possession of his farm so that he might maintain his farmer debtor proceeding, the bankruptcy court by dismissing that proceeding rendered the entire litigation useless. The abstract legal right to enter into possession of his farm was of no practical value to him if he could not maintain it by pursuing his farmer debtor proceeding. In effect, the decision of the Supreme Court of the United States was rendered moot before it was announced by the prior order of dismissal entered *sua sponte* by the bankruptcy court.

The record of world events which has been unfolding during the past decade justifies the faith of our fathers in the fundamental principle of Anglo-Saxon jurisprudence, due process of law. The people refused to adopt the Constitution without assurance that the ancient doctrine of due process would be expressly incorporated in it. The fifth amendment was for that reason adopted. Two generations later they broadened its application in the fourteenth amendment. That no person shall be deprived of life, liberty or property without due process of law is the surest guarantee of the faith of the people in their government and therefore of its stability.

In ten unanimous decisions interpreting the farmer debtor law this court has required that the purpose of the law shall be observed—that the courts shall endeavor, not merely to obey the letter of the law but to execute the broad purpose intended to be accomplished by its spirit.

The reasoning offered by the respondents to justify the dismissal of the farmer debtor's proceeding without notice and without a hearing (during the very time he, as an impoverished litigant, was exerting every effort in the state and federal courts to regain possession of his farm) seems to the petitioner to be a specious argument which would emasculate the law he seeks the right to invoke. The petitioner asks that his farmer debtor proceeding be restored to the status it had when the bankruptcy court dismissed it.

The orders of the bankruptcy court, which have been sustained by the appellate court, are in direct conflict with the uniform decisions of this court and of the other federal courts.

If this anomalous restraining order should become the accepted rule, henceforth, many decisions of this court may be practically annulled by restraining orders issued out of a district court of the United States.

If a farmer debtor proceeding may be dismissed by a bankruptcy court without notice and without hearing the same day that a conciliation commissioner without

notice files a recommendation, a principle of American jurisprudence of far-reaching importance has been set aside.

The departure from the accepted and usual course of judicial procedure is especially important in this instance. The petitioner as farmer debtor was assiduous in complying with every requirement of the court and of the conciliation commissioner. The lengthy and costly litigation the petitioner was obliged to take grew out of the unlawful acts of the respondents. The report of the conciliation commissioner recommending dismissal of the proceeding was filed in the bankruptcy court just five days after the state court had forcibly and unlawfully ejected him and his family and seems to have been a result of that unlawful act. This report of the conciliation commissioner to the bankruptcy court was filed without any notice to the petitioner. The bankruptcy court on the same day issued the order of dismissal without notice or hearing.

The relation between the petitioner and the respondents is now precisely as it was when the respondents as mortgagees secured the ejectment of the petitioner as mortgagor and farmer debtor. The petitioner should be restored to his land and permitted to have the benefits of the farmer debtor law.

Wherefore your petitioner prays that a writ of certiorari may issue to the Circuit Court of Appeals for the Seventh Circuit commanding it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be reviewed and determined by this Honorable Court and for all other relief as may be proper.

Respectfully submitted,

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Dated: February 24, 1941.